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In the Supreme Court of the United States

OCTOBER TERM, 1977

DUANE OWEN HESTNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1977. A motion for reconsideration was denied on July 22, 1977. The petition for a writ of certiorari was filed on August 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion under Rule 403, Fed. R. Evid., in refusing to allow petitioner to introduce the cumulative testimony of a second expert witness.

2. Whether the district court's instruction on reasonable doubt constituted reversible error.

3. Whether the district court erred in holding that Rule 16(a)(1)(D), Fed. R. Crim. P., did not require the government to provide petitioner with unwritten results of a scientific test not performed in connection with petitioner's trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on three counts of distributing cocaine, in violation of 21 U.S.C. 841. Petitioner was sentenced to concurrent terms of five years' imprisonment, followed by concurrent special parole terms of three years. The court of appeals affirmed (Pet. App. 1a-8a).

The evidence at trial established that a special agent of the Drug Enforcement Administration ("DEA") met petitioner through an informant in Stoughton, Wisconsin, on December 1, 1975 (I Tr. 28-29). After discussing the possibility of effecting a cocaine transaction, the agent and petitioner arranged a meeting on December 16, 1975, at which petitioner gave the agent 28.15 grams of cocaine in exchange for $1,400 (*id.* at 114-118). A similar meeting took place on December 18, 1975, at which petitioner gave the agent 28.05 grams of cocaine in exchange for $1,400 (*id.* at 139-141, 146-148). At a third meeting, on January 13, 1976, petitioner exchanged 56.37 grams of cocaine for $3,100 (*id.* at 161-166). Petitioner was arrested on February 18, 1976 (II Tr. 249).

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the district court abused its discretion under Rule 403, Fed. R. Evid., in refusing to allow petitioner to call a second expert witness

at trial. After examining the record, the court of appeals correctly concluded that the proffered testimony was of "limited probative value" and "essentially cumulative," and therefore that the district court did not err in its evidentiary ruling (Pet. App. 2a-6a). That determination does not warrant review by this Court.[1]

The only disputed issue at trial involved the identity of the substances that petitioner had sold to the DEA agent. The government sought to prove that the white powder received by the agent contained "*l* "-cocaine, a controlled substance under 21 U.S.C. 841. Petitioner, on the other hand, attempted to persuade the jury that the government's evidence was insufficient to establish beyond a reasonable doubt that the powder contained "*l* "-cocaine rather than one of the numerous other

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[1]In August 1977, petitioner was tried on a different charge before the same district judge in the Western District of Wisconsin. On October 25, 1977, petitioner filed with this Court a motion to vacate the judgment of the court of appeals in this case and to remand for reconsideration in light of certain comments allegedly made by the district judge in the second trial. The alleged comments, reproduced at page 5 of petitioner's motion, reveal simply that in excluding the second expert witness at petitioner's October 1976 trial, the district judge was motivated by the need to keep the length of the trial "within reasonable limits." In deciding whether to permit "essentially cumulative" testimony, the district judge was influenced by his view that

> frequently during the trial, [defense counsel] had engaged in cross-examinations for unreasonably long periods of time. Those repeated occasions could be fairly characterized as the pursuit of points in interrogation at lengths utterly inappropriate to their intrinsic importance in the trial, at lengths far beyond those reasonably appropriate to efforts to diminish the witness's credibility.

Under Rule 403, Fed. R. Evid., such considerations are perfectly appropriate in a district court's decision on the admission of evidence. Petitioner's motion should be denied.

isomeric forms of that drug not derived or prepared from coca leaves and hence not qualifying as controlled substances under Section 841. The government's expert testified he had performed a mixed melting point test using gold chloride derivatives in order to identify the unknown substances as "*l* "-cocaine (III Tr. 4-79); IV Tr. 164-188). Petitioner's counsel cross-examined the expert at great length about this test (IV Tr. 190-230, 286-347; V Tr. 370-496). He then introduced detailed testimony by petitioner's own expert concerning defects in the test (VI Tr. 661-730). After petitioner's expert witness had testified, defense counsel requested the court to wait just over a quarter of an hour for the expected arrival of a second defense expert witness. Counsel represented that the witness was a qualified chemist whose testimony would cast further doubt on the reliability of the test performed by the government's expert witness. The district court refused to allow petitioner to call this expert (*id.* at 763, 765-767).

Rule 403, Fed. R. Evid., allows the exclusion of relevant evidence "if its probative value is substantially outweighed by * * * considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A district court has considerable latitude in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony. *Hamling* v. *United States*, 418 U.S. 87, 108. Here, any flaws that may have marred the test conducted by the government's expert were stressed by defense counsel on lengthy cross-examination and during the extensive presentation of his own expert. The offer of proof regarding the second defense expert revealed that that witness would merely reiterate earlier testimony concerning alleged inadequacies

in the government's test. Given the volume of testimony already introduced on the subject, the court's exclusion of the witness was not error.[2]

2. Petitioner next contends (Pet. 12-14) that the district court improperly instructed the jury on the meaning of reasonable doubt. The court first charged that the prosecution had the burden of proving the defendant guilty beyond a reasonable doubt and that if the government failed to carry that burden, the jury was obliged to render a verdict of acquittal. The court then stated (VII Tr. 96-97):

> A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his or her life.

This instruction was drawn verbatim from LaBuy, *Manual on Jury Instructions in Federal Criminal Cases*, Part I, § 6.01-3, 33 F.R.D. 523, 567 (1963).

The Seventh Circuit has expressed disapproval of the equation of "reasonable doubt" with "substantial doubt" and, in an exercise of its supervisory power, has indicated that a district court giving such an instruction over objection "can reasonably expect a reversal." *United States* v. *Wright*, 542 F. 2d 975, 988 (C.A. 7). *Wright* was decided on September 27, 1976; the jury instructions in this case were given on October 25, 1976. In a

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[2]Petitioner's reliance on *Washington* v. *Texas*, 388 U.S. 14; *Chambers* v. *Mississippi*, 410 U.S. 284; *Braswell* v. *Wainwright*, 463 F. 2d 1148 (C.A. 5), and *United States* v. *White*, 324 F. 2d 814 (C.A. 2), is misplaced. Each of those cases involved the exclusion of one or more material witnesses whose testimony was crucial to the defense theory of the case.

memorandum filed several days after the jury had reached its verdict (Pet. App. 9a-12a), the district judge explained that he had not read the *Wright* slip opinion until October 30, 1976, and consequently had been unaware of the appellate court's rejection of the challenged language at the time the charge was given.[3] On petitioner's motion for a new trial, the district judge expressed regret at not having read *Wright* more promptly but concluded that the verdict returned after a vigorously fought five-day trial should not be disturbed in anticipation of the manner in which the appellate court might decide to exercise its supervisory power (Pet. App. 15a-17a).

The court of appeals found that the district court's failure to follow *Wright* was not deliberate and that no prejudice to petitioner could have resulted therefrom (Pet. App. 7a). The court stressed that its holding in *Wright* was based not on considerations of due process or inherent prejudice, but rather on the appellate court's supervisory power. Under the circumstances, the Seventh Circuit did not believe that this case presented an appropriate occasion for its exercise of that power. Since the resolution of this case depended heavily on its special facts, and since future reasonable doubt instructions given by district courts in the Seventh Circuit will not contain the objectionable paragraph, further review by this Court is not warranted.

Petitioner asserts (Pet. 12-14) that the court of appeals' ruling in this case conflicts with the law in the Fifth Circuit, as reflected in *United States* v. *Alvero*, 470 F. 2d 981 (C.A. 5). Petitioner is incorrect for two reasons: (i)

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[3]Although defense counsel did object to the reasonable doubt instruction, neither he nor the prosecutor called the *Wright* decision to the court's attention.

Alvero involved a distinguishable factual situation; and (ii) a later Fifth Circuit decision demonstrates that the approach of that court of appeals is similar to the one adopted by the Seventh Circuit. In *Alvero*, the reasonable doubt instruction included the following passage (470 F. 2d at 982-983):

> It is not a speculative doubt, but any substantial reasonable doubt, common, ordinary horsesense doubt. It is one that remains after all the evidence is in that would cause a reasonable person to entertain a reasonable and proper doubt; a very substantial doubt, let me put it that way, of the guilt of the defendant. Then, of course, you must find him not guilty.

Both sides objected to the use of the phrase "*very* substantial doubt" (emphasis added). The trial judge gave further instructions intended to cure the error, but did not retract the offending language. Unpersuaded that the corrective efforts had had their desired effect, the court of appeals reversed. *Alvero* is thus significantly different from the present case, with respect to both the reasonable doubt charge actually given and the aftermath of that charge in the district court.

Moreover, in *United States* v. *Muckenstrum*, 515 F. 2d 568 (C.A. 5), the Fifth Circuit has recently reviewed a reasonable doubt instruction resembling the one here under attack. In that case, the district court told the jury (515 F. 2d at 570-571):

> Now, a reasonable doubt, as used in these instructions, means a doubt that is based on reason and common sense. Such doubt must be substantial rather than speculative, that is, a defendant is never to be convicted on mere suspicion or conjecture. Such doubt, however, must be a doubt that is reasonable and one which arises from the evidence or lack of it.

> It does not mean a mere possible doubt or a speculative, imaginary or forced doubt, because everything relating to human affairs is open to some possible or imaginary doubt.

The court of appeals held that, in the context of the whole charge, the challenged portion did not equate reasonable doubt with substantial doubt. The court added that

> the sentence instructing that a doubt must be substantial rather than speculative is confusing in that arguably it raises the burden from "reasonable doubt" to "substantial doubt" and would better be left unsaid.

Taken together, *Alvero* and *Muckenstrum* display no inconsistency with the position of the Seventh Circuit in *Wright* and the present case.[4]

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[4]In *United States* v. *Fallen*, 498 F. 2d 172 (C.A. 8), the Eighth Circuit sustained a criminal conviction despite the fact that, over objection, the district court had included the following sentence in its charge to the jury (498 F. 2d at 177):

> [A] reasonable doubt means a substantial doubt and not the mere possibility of innocence.

The court of appeals noted that the district court had also described reasonable doubt as "the kind of doubt that would make a reasonable person hesitate to act." Reviewing the instruction as a whole, the court concluded that the district judge had "conveyed the proper concept of reasonable doubt" (*ibid.*). The court stressed that its ruling did not diminish the vitality of *United States* v. *Atkins*, 487 F. 2d 257 (C.A. 8), decided several days after the *Fallen* trial. In *Atkins*, the district court used the same sentence which had prompted objection in *Fallen*. No objection was raised, however. The court of appeals declared that it did not approve of the statement that "reasonable doubt means a substantial doubt," but it refused to characterize the district court's charge as plain error requiring reversal even in the absence of contemporaneous objection. The outcomes in *Fallen* and *Atkins* are similar to, and certainly not in conflict with, the results reached by the Seventh Circuit in *Wright* and this case.

3. Petitioner contends (Pet. 15-16) that the district court erred in permitting the introduction of testimony concerning a scientific test performed on a government laboratory sample in November 1975, more than two months before petitioner's arrest. Under Rule 16(a)(1)(D), Fed. R. Crim. P., the government must produce upon request

> any results or reports * * * of scientific tests or experiments, * * * which are within the possession, custody, or control of the government, * * * and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

In March 1976, defense counsel filed a Demand for Discovery under this rule. In June 1976, the district court entered an order directing the government to comply with petitioner's discovery request (I Tr. 222-223; III Tr. 91-92). Due to a failure of communication between the prosecutor and the DEA laboratory in Chicago, polarimetry tests on the substances distributed by petitioner were not performed until October 1976, shortly before the beginning of trial (I Tr. 187-188). When the government attempted through its expert witness to introduce the results of these tests in order to prove that the substances in question were "*l* "-cocaine, the district court excluded the proffered testimony on the ground that the government had failed to make timely disclosure to defendant before trial (I Tr. 239). The government then attempted to introduce the results of a mixed melting point test, performed by the same expert in January 1976 and properly reported to defendant. This test involved a comparison of the substances obtained from petitioner with a quantity of known cocaine extracted from a laboratory standard sample.

To increase the probative value of the test results, the government sought to introduce scientific evidence showing that the laborato:y standard material was in fact "/"-cocaine. Over an eleven-month period, the government's expert witness had repeatedly tested the standard substance in the course of making comparisons with numerous unknowns submitted for his analysis. These tests had uniformly demonstrated that the standard was "/ "-cocaine. Ordinarily, the expert recorded the results of his testing in written form. Because the government failed to provide defendant with reports of these earlier tests conducted in connection with entirely unrelated cases, the district court refused to allow the government's expert to testify concerning his series of tests on the laboratory standard. The court made one exception, however. In November 1975, when the government's expert first opened the jar of standard cocaine obtained from a chemical supply company, he performed a polarimetry test on the contents shortly after breaking the manufacturer's seal. This test revealed that the substance in the jar was "/ "-cocaine. The chemist made no written record of this test, because no comparison with an unknown was involved and therefore no report needed to be prepared for litigation purposes. Since the results of this test were never reduced to writing, the district court ruled that the government was under no obligation to disclose those results pursuant to petitioner's discovery demand. Accordingly, the court permitted the government's expert witness to testify regarding the test on the laboratory standard performed in November 1975 (III Tr. 41-43, 46-52, 84-102; IV Tr. 114-121, 131-148, 164-170).

In denying petitioner's motion for a new trial, the district court stated that Rule 16(a)(1)(D) "reaches only to documents and things which are capable of being

physically delivered or inspected or copied" (Pet. App. 15a). The court of appeals agreed and affirmed (Pet. App. 8a).

The district court's interpretation of Rule 16(a)(1)(D) is correct. The language of the rule plainly contemplates discovery of tangible reports. The rule directs the government to permit defendants "to inspect and copy or photograph any results or reports" of relevant scientific tests or experiments within the government's control. The references to inspection and reproduction assume the existence of palpable data. Here, where the results of the November 1975 test were not reduced to writing and where the failure to prepare a written report was attributable to ordinary operating procedure, not to any scheme designed to avoid discovery,[5] the government was not required, under the district court's June 1976 order, to notify petitioner that a DEA chemist had determined that the laboratory standard was "/ "-cocaine. Since the outcome of the November 1975 test was not improperly withheld from defendant before trial, the district court did not err in allowing the government's expert witness to testify about that test.

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[5] *In re Serra*, 484 F. 2d 947 (C.A. 9), cited by petitioner, is inapposite. *Serra* involved the affirmance of a contempt adjudication against an attorney for deliberately attempting to frustrate the district court's discovery order by instructing a doctor hired to make a psychiatric examination of the defendant not to prepare a written medical report. In the present case, there is no suggestion of governmental impropriety. Indeed, the disputed test was performed more than a month before petitioner's cocaine sales and more than two months before petitioner's arrest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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